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IN THE

Supreme Court of the United States

No. 193. **October Term, 1935.**

ELINOR DORRANCE HILL,

Appellant,

v.

J. H. THAYER MARTIN, State Tax Commissioner of the State of New Jersey; WILLIAM D. KELLY, State Supervisor, Inheritance Tax Bureau, of the State of New Jersey; FRANK J. MURRAY, Comptroller of the State of New Jersey; WILLIAM H. ALBRIGHT, State Treasurer of the State of New Jersey; and DAVID T. WILENTZ, Attorney General of the State of New Jersey,

Appellees.

Brief Contra Motion to Dismiss.

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Appellees.

BRIEF CONTRA MOTION TO DISMISS

STATEMENT

In their "Statement in Answer to Appellants' Statement as to Jurisdiction," appellees have included a motion to dismiss.

We should not file this brief, but for the confusing statements made by appellees regarding the nature, effect, and finality of the proceedings before the New Jersey authorities contesting the New Jersey inheritance tax assessment.

Accordingly, in this brief we shall endeavor to establish:

1. That no proceeding has as yet been instituted by New Jersey or by the agents of New Jersey to collect inheritance tax on the intangible personal property of the Dorrance estate.

2. That the proceedings thus far had in New Jersey have been administrative and not judicial.

3. That regardless of whether the proceedings have been administrative or judicial, they have not eventuated in a judgment in favor of New Jersey for tax due by the Dorrance estate upon which execution could issue.

4. That, assuming the action of the Supreme Court of New Jersey to be judicial rather than administrative, the action of that court is not a final judgment which bars proceedings in a Federal Court between the same parties involving the same questions.

5. That this case comes within Section 266 of the Judicial Code.

6. That neither Section 265 of the Judicial Code nor a plea of res judicata deprives the court below of jurisdiction to grant the injunction prayed for in the bill of complaint.

ARGUMENT.

I.

NO ACTION HAS AS YET BEEN INSTITUTED BY THE NEW JERSEY AUTHORITIES TO COLLECT INHERITANCE TAX FROM THE DORRANCE ESTATE.

Paragraph 43 of the Amended Bill of Complaint reads as follows:

> "43. From the decree of the Prerogative Court, executors obtained a writ of certiorari from the Supreme Court of the State of New Jersey, which on February 11, 1935, sustained the decree of the Prerogative Court. The action of the Supreme Court is not final, being subject to judicial review by the Court of Errors and Appeals. **And the tax which defendants demand cannot be collected until after the institution of an action of debt in the name of the State of New Jersey, or a statutory proceeding in the Prerogative Court of New Jersey.**"

In their Amendment to Answer, appellees say, *inter alia,* in reply to paragraph 43 of the Amended Bill of Complaint

> "**They admit that said tax cannot be collected until after the institution of an action of debt in the name of the State of New Jersey, or by a statutory proceeding in the Prerogative Court of New Jersey;** further answering they say that said statutory proceeding is as follows:
>
> " '21. If it shall appear to the State Tax Commissioner that any tax which has accrued under this act has not been paid according to law said

Commissioner shall report such fact, in writing, to the register of the Prerogative Court, and said register shall issue a citation citing the persons or corporations interested in the property liable to said tax to appear before the Ordinary on a certain day, not more than three months from the date of such citation, and show cause why such tax should not be paid; the service of such citation and the subsequent proceedings had thereon shall conform to the practice prevailing in the Prerogative Court. Upon the making of any decree the register of the Prerogative Court shall, upon the request of the State Tax Commissioner, furnish one or more copies of said decree, and the same shall be docketed and filed by the clerk of the Supreme Court, or by the county clerk of any county in this State, upon the request of the State Tax Commissioner, and the same shall have the same effect as a lien by judgment, and execution shall issue thereon according to the rules and practice appertaining to other judgments docketed and filed with said respective clerks.

" '22. Whenever the State Tax Commissioner shall have reason to believe that any tax is due and unpaid under this act, after the neglect and refusal of the persons or corporations interested in the property and liable to said tax to pay the same, he shall notify the Attorney-General of this State, in writing, of such failure to pay such tax, and the said Attorney-General, when so notified, if he have probable cause to believe that a tax is due and unpaid, shall prosecute the proceeding before the Ordinary of this State, as provided for in section twenty-one of this act, and the State Treasurer shall, on the warrant of the Comptroller, and the certification of the State Tax Commissioner, pay all the expenses of said proceeding.' "

Thus the appellees have definitely admitted by their answer that as yet they have not instituted either of the alternative forms of action necessary to collect transfer inheritance tax from the Dorrance Estate.

Hitherto the only litigation in New Jersey relating to the tax in question has been the executors' appeal from the assessment of tax made by the State Tax Commissioner.

The procedure open to the executors under the statutes of New Jersey was as follows:

(1) The executors had a right to appeal to the Ordinary from the assessment made by the State Tax Commissioner. The Ordinary embodied his action on the appeal in a decree filed in the Prerogative Court.

(2) The Ordinary having sustained the assessment, the executors had a right to petition the Supreme Court of New Jersey for a writ of certiorari bringing up for review the action of the Ordinary.

(3) The Supreme Court having sustained the assessment, the executors now have a right to take an appeal to the Court of Errors and Appeals.

Both in the proceedings before the Ordinary and before the Supreme Court of New Jersey, the executors were the plaintiffs or prosecutors, and the State Tax Commissioner was the defendant or respondent.

The only result of the litigation thus far has been that the assessment made by the State Tax Commissioner has been sustained.

The State of New Jersey has not been a party to the proceedings, nor have the proceedings eventuated in a judgment in favor of the State or its collecting officer and against the executors.

As appellees admit, to convert the assessment into an enforceable judgment, an independent action must be instituted. That action may be either an action of debt or what is denominated a statutory proceeding in the Prerogative Court.

Such action of debt or such statutory proceeding in the Prerogative Court is entirely independent of the executors' appeal from the assessment.

The executors' appeal from the assessment was a proceeding instituted **by** the executors. The action of debt or the statutory proceeding in the Prerogative Court would be an action instituted **against** the executors.

In this case the time has not expired within which the executors may as a matter of right appeal from the decision of the Supreme Court of New Jersey sustaining the assessment, to the Court of Errors and Appeals. That time will not expire until February 11, 1936.

At the moment there is no litigation actually pending in New Jersey regarding either the assessment or the collection of the tax, but the executors have signified their intention of taking an appeal to the Court of Errors and Appeals, should that step be necessary to protect the interests of the estate.

It seems clear that an injunction to restrain the collection of the tax could not under any circumstances be regarded as a stay of proceedings in a State court within the meaning of Section 265 of the Judicial Code. In the only proceedings which have as yet been instituted, the executors were the moving parties; and if those proceedings are carried further, the executors must take the next step. An injunction against the appellees will not prevent

the executors from taking their appeal to the Court of Errors and Appeals.

Of course, every injunction restraining the collection of a tax prevents litigation from being commenced to collect it. But Section 265 of the Judicial Code has never been construed as preventing the issuance of such an injunction. That section forbids Federal interference with pending State litigation; nothing more.

What we have said is true even though it were to be conceded that the action both of the Ordinary and of the Supreme Court of New Jersey in reviewing the State Tax Commissioner's assessment was judicial in character.

II.

THE PROCEEDINGS HERETOFORE HAD IN THE NEW JERSEY COURTS HAVE BEEN ADMINISTRATIVE AND NOT JUDICIAL.

Clearly, if the proceedings thus far had in the New Jersey courts have been administrative and not judicial, the executors of the will of Dr. Dorrance had a right at their conclusion to ask for relief in the District Court of the United States. See **Prentis** v. **Atlantic Coast Line Company**, 211 U. S. 210 (1908); **Bacon** et al. v. **Rutland R. R. Co.**, 232 U. S. 134 (1914); **Pacific Telephone & Telegraph Company** v. **Kuykendall**, 265 U. S. 196 (1924).

In **Miller** v. **McCutcheon**, 175 Atl. 155, (1934), the New Jersey Court of Errors and Appeals said in discussing the function of the Ordinary in reviewing tax assessments:

> ". . . The Ordinary, in exercising the power conferred by the statute (supra) to hear and determine tax questions of this character, is a statutory agent only . . ."

In **Nevin** et al. v. **Martin** et al., now pending before the District Court of the United States for the District of New Jersey, In Equity No. 4805, the present Attorney General of New Jersey filed an exhaustive brief in support of his position that the action of the Ordinary in reviewing assessments made by the State Tax Commissioner was purely administrative and not judicial. We print as an appendix hereto, the exact language used by the Attorney General in pressing this point.

It can scarcely be argued that the action of "a statutory agent only" may be regarded as judicial. Certainly that is not the language which the highest court of any state would employ to characterize a judicial officer in the performance of a judicial duty. The position of the Attorney General of New Jersey in the **Nevin Case**, that in reviewing tax assessments the Ordinary's action is purely administrative and not judicial, is sound. His position in the present case, that the Ordinary's action is wholly judicial and not administrative, is neither consistent nor sound.

We now reach the question: What is the nature of the review by the Supreme Court of New Jersey of the action of the Ordinary in tax cases such as this?

In reviewing tax assessments the Supreme Court of New Jersey functions under Section 11 of the New Jersey Certiorari Act of 1903 as amended by the Act of April 12, 1907 P. L. 95.

That act provides that:

"**In all cases of writs of certiorari** now pending or hereafter **brought to remove any tax or assessment**, or other order or proceeding touching any local or public improvement, or to review the proceedings of any special statutory tribunal, or to review the sus-

pension, dismissal, retirement or reduction in rank of any person holding an office or position, state, county or municipal, from which he is removable only for cause and after trial, the courts shall determine disputed questions of fact, as well as of law, and inquire into the facts by depositions taken on notice, or in such other manner as is according to the practice of the court; provided, either party may use the testimony taken before the tribunal, board or officer whose action is being reviewed which testimony shall be considered by the court the same as if it had been taken by deposition on notice and either party may take additional testimony. The court may reverse or affirm, in whole or in part, such tax or assessment or other order or proceeding, finding or determination, suspension, dismissal, retirement or reduction in rank reviewed."

This act has been sustained as constitutional. **Royal Mfg. Co.** v. **City of Rahway**, 75 N. J. Law 416 (1907).

In **Trenton & Mercer County Traction Corporation** v. **Mercer County Board of Taxation**, 92 N. J. Law 398 (1918), the Court of Errors and Appeals reversed the action of the Supreme Court of New Jersey in a tax case on the ground that it confined its review of the facts to a consideration of the question whether there was any evidence to support the findings below. Speaking for the court Judge Swayze said:

"The Supreme Court took too narrow a view of its functions in this case. It held that the judgment of the county board of taxation was not unreasonably or illegally reached and was supportable upon the facts and the figures adduced before it. This involved merely a determination that there was no erroneous legal principle shown to have been adopted by the county board, and that there was evidence to support its finding. But

this determination was not a compliance with the mandate of the Tax Act or of the Certiorari Act . . .

"Section 11 of the Certiorari Act as amended in 1907 (P. L. 95; 1 C. S. 405) requires the Supreme Court to determine disputed questions of fact in tax cases as well as in other cases therein set forth. . . . In the present case the Supreme Court failed to make an independent determination of facts, and contented itself with finding that there was a legal basis for the result reached by the county board of taxation whether or not that result was right in fact. This error makes it necessary to reverse the judgment and remit the record to the Supreme Court in order that it may find the facts."

See also similar language in the opinion of the Court of Errors and Appeals in **Gibbs** v. **State Board of Taxes and Assessment,** 101 N. J. L. 371 (1925).

That the Supreme Court of New Jersey is established by the Constitution of New Jersey does not to any degree determine the question whether its action in reviewing such assessments is administrative or judicial. Nor does the procedure for bringing up assessments for review. As a matter of fact the Prerogative Court,—in which the Ordinary files his decree,—is likewise established by the Constitution of New Jersey.

This Court has held in the following cases that courts created by State Constitutions were exercising administrative rather than judicial functions:

Prentis v. **Atlantic Coast Line Company,** 211 U. S. 210 (1908);

Oklahoma Natural Gas Company v. **Russell** et al., 261 U. S. 290 (1923).

In the cases just cited the procedure by which the courts were authorized to review the actions of inferior administrative agencies was by appeal.

And this court has held that courts were exercising administrative functions even though their jurisdiction was invoked by bill in equity, in:

Keller v. **Potomac Electric Co.**, 261 U. S. 428 (1922);

Radio Commission v. **General Electric Co.**, 281 U. S. 464 (1930); and

Porter v. **Investors Syndicate**, 286 U. S. 461 (1932).

We submit that on this point the present case parallels **Radio Commission** v. **General Electric Company**, 281 U. S. 464 (1930). And the New Jersey procedure is quite different from the Pennsylvania procedure which this Court said was judicial, in **City Bank Farmers Trust Co.** v. **Schnader**, et al., 291 U. S. 24 (1934).

In the **Radio Commission Case** the court was authorized to examine the record before the administrative tribunal,—the Radio Commission,—to take additional evidence upon such terms and conditions as it might deem proper, to hear, review and determine the appeal upon said record and evidence, and to alter and revise the decision appealed from and enter such judgment as to it might seem just.

In this case the Supreme Court of New Jersey under the Certiorari Act was authorized to determine disputed questions of fact as well as of law, to inquire into the facts by deposition or in such other manner as is in accordance with the practice of the court, and to reverse or affirm in whole or in part the assessment reviewed.

Unlike the procedure in Pennsylvania to which this court referred in the **Schnader Case**, the New Jersey procedure does not bring the State into court as plaintiff nor

make the taxpayer defendant in the proceeding. The case is not tried as an ordinary appeal before the Supreme Court of New Jersey. It is a review on certiorari under the express terms of the New Jersey Certiorari Act we have quoted.

As we have previously stated, under the New Jersey procedure the action in the Supreme Court was between the executors of the Dorrance Estate as prosecutors, and the State Tax Commissioner as respondent. At its conclusion there was not a judgment in favor of the State of New Jersey and against the executors. Such a judgment, we repeat, could be obtained only by the institution of an action of debt or of a new statutory proceeding in the Prerogative Court in which the decree of the court could be entered as a judgment against the taxpayers.

III.

RELIEF BY THE DISTRICT COURT OF THE UNITED STATES IS NOT BARRED BY THE DECISION OF THE SUPREME COURT OF NEW JERSEY.

If, as we contend, the Supreme Court of New Jersey acts administratively in reviewing tax assessments, obviously its decision cannot be pleaded as res judicata in an action in equity in a Federal court.

But even if the action of the Supreme Court of New Jersey were judicial and not administrative, nevertheless its decision could not under the circumstances of this case be pleaded as res judicata.

The executors of the Dorrance Estate may as a matter of right appeal from the decision of the Supreme Court of New Jersey to the Court of Errors and Appeals. Their time for taking an appeal does not expire until February 11, 1936. They have stated their intention of taking an

appeal unless the action in the Federal court renders such an appeal unnecessary. See paragraph 47 of plaintiff's Amended Bill of Complaint, the concluding sentences of which are,

> "Under the statutes of New Jersey, executors may take their appeal to the Court of Errors and Appeals at any time prior to February 11, 1936. Executors will take such appeal prior to that date, unless in the meantime this action renders such appeal unnecessary."

We submit that there is a marked difference between the application of the doctrine of res judicata as between the courts of a State, and as between State and Federal courts.

Necessarily the judgment of a lower court of a State may be pleaded as a bar to the trial of the same issue between the same parties in another lower court of the same State, even though an appeal is pending to an appellate court of the State.

But the right of a party to invoke the jurisdiction of a Federal court cannot be barred by a plea of res judicata, unless the pleaded judgment is either that of the State court of last resort and the period for appeal or petition for certiorari (in proper cases) to this Court has expired, or the judgment of a lower State court in which the parties have acquiesced without resort to the appellate court. This rule was clearly stated by Judge Simonton in **Eastern Building & Loan Association of Syracuse** v. **Welling**, 103 Fed. 352 (D. S. C. Car. 1900), 355.

This Court has repeatedly spoken of "a final judgment" in dealing with the effect of a plea of res judicata.

In **Grubb** v. **Public Utilities Commission**, 281 U. S. 470 (1930), Mr. Justice Van Devanter, at page 476, spoke of a final judgment in the State court as barring future proceedings in a Federal court. At page 475 in stating the facts of the case, he said:

> "After a hearing in which all of the parties participated the state court rendered a judgment sustaining and affirming the Commission's order in its entirety. 119 O. S. 264. **No effort was made to have that judgment reviewed by this Court, and after the three months allotted for applying for such a review had elapsed,** the defendants in the suit in the District Court, . . . interposed answers setting up the judgment as a bar to the further prosecution of the suit . . ."

In **American Surety Company** v. **Baldwin**, 287 U. S. 156 (1932), Mr. Justice Brandeis, at page 164, spoke of proceedings taken in the State court "which ripened into a final judgment," constituting res judicata.

In this case the executors have not exhausted the State procedure and have given notice of their intention to take a further appeal to which they are entitled as a matter of right.

Thus the decision of the Supreme Court of New Jersey even though it be regarded as judicial rather than administrative is not a bar to the prosecution of an action in the court below by the executors of the Dorrance estate, much less of an action by a legatee to protect her own interests after the executors have denied their authority to act as such, and the State authorities have taken steps to have the executors removed. See Statement as to Jurisdiction for the facts to which we refer.

IV.

THIS CASE COMES WITHIN SECTION 266 OF THE JUDICIAL CODE.

In their motion to dismiss this appeal, appellees state dogmatically that this case does not come within Section 266 of the Judicial Code.

We submit that the only differences between this case and **City Bank Farmers Trust Co.** v. **Schnader**, 291 U. S. 24 (1934) are (1) that this action was brought after the State taxing officer had made his assessment and that assessment had been reviewed by the Ordinary and the Supreme Court of New Jersey, whereas in the **City Bank Farmers Trust Company Case**, a Federal action was brought before the State taxing officer had concluded his assessment; and (2) that the present case involves the situs of **intangible** personal property for inheritance tax purposes, whereas the **City Bank Farmers Trust Company Case** involved the situs of **tangible** personal property for inheritance tax purposes.

In each case the statute in question was not alleged to be unconstitutional per se. It was alleged to be unconstitutional only because if applied to certain facts, the statute would authorize the taking of property of an estate without due process of law. This has repeatedly been held to be such a challenge of the constitutionality of an act as comes within Section 266 of the Judicial Code. See **Sterling** et al v. **Constantin**, 287 U. S. 378 (1932).

If the allegations of the bill of complaint in **City Bank Farmers Trust Company** v. **Schnader** brought that controversy under Section 266 of the Judicial Code, as this Court held they did, then the allegations of the bill of complaint in the present case bring this controversy within Section 266 of the Judicial Code.

V.

THIS CASE PRESENTS A NOVEL PROBLEM.

We have pleaded the judgment of the Supreme Court of Pennsylvania, subjecting the Dorrance estate to Pennsylvania transfer inheritance tax on the estate's intangible personal property.

The Ordinary of New Jersey held that a judgment for inheritance tax is an action in rem. His decision was affirmed in a per curiam opinion by the Supreme Court of New Jersey.

If such a judgment is in rem it would seem to be binding upon all parties, whether or not they appeared in the particular litigation in which the judgment was rendered.

We have also averred notice to the New Jersey authorities of the pendency of the Pennsylvania litigation, the appearance therein as a witness of one of the present appellees, and an invitation by the executors of the estate to the New Jersey authorities to participate in the Pennsylvania litigation.

If we have presented a Federal question in this case,—as we are confident we have,—the situation is this:

Is a Federal court bound to accept as a finality the judgment of a court of intermediate appeal in New Jersey, holding the decedent domiciled in that State, notwithstanding the judgment of the Pennsylvania court of last resort that the decedent died domiciled in Pennsylvania?

Or, in such a case, do the usual rules of comity between State and Federal courts give way, leaving the Federal court free to ascertain the facts and reach its conclusion independently of the prior decision of either State court?

Or, if judgments in such cases be in rem, is the Court bound, upon taking jurisdiction, to treat the Pennsylvania judgment as final and binding upon the world?

We believe that the situation here presented has never come before this Court.

VI.

CONCLUSION.

We believe that appellees' motion to dismiss this appeal should be denied.

Respectfully submitted,

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JOHN MILTON,
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